UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Robert Pitofsky, Chairman
Mary L. Azcuenaga
Janet D. Steiger
Roscoe B. Starek, III
Christine A. Varney

In the Matter of	)
COLUMBIA/HCA HEALTHCARE CORPORATION, a corporation.	) Docket No. C-3619

ORDER REOPENING AND MODIFYING ORDER

On February 18, 1997, Columbia/HCA Healthcare Corporation ("Columbia") filed its Petition Of Columbia/HCA Healthcare Corporation To Reopen And Modify Order ("Petition") pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.51. Respondent asks that the Commission reopen the proceeding in Docket No. C-3619 and modify the Order to terminate the requirement that Columbia divest the commercial lease identified in Item 6 of Part II of Section A of Schedule B of the Order ("the Infusamed Lease"). The Petition was placed on the public record for thirty days, until March 24, 1997, and no comments were received. For the reasons discussed below, the Commission has determined to grant Columbia's Petition.

Columbia states that this Petition is the second step of two procedural steps to remedy a minor error in the Order. On December 5, 1995, Columbia filed a petition to reopen and modify the Order to terminate the Utah Hold Separate requirements upon its completion of the divestiture of the Part I assets listed on Schedule B of the Order, i.e., the Utah hospitals themselves. The Part II assets listed on Schedule B consist of certain assets and businesses that were identified by Columbia during consent negotiations with Commission staff as being related to each of the listed Utah hospitals,[1] and included the Infusamed Lease. On May 15, 1996, the Commission granted Columbia's December 5, 1995 petition. In addition, as of May 17, 1996,

[1] The only distinction that the Order expressly makes between the Part I and Part II assets is that the acquirer of a divested Part I hospital need not give the Commission prior notification of the re-sale of a Part II asset to anyone who also owns a hospital in the relevant market. See Order, Paragraph IV.F.

Columbia completed the divestitures of all of the Utah hospitals and related assets and businesses required by the Order except for the Infusamed Lease Asset.

As explained in the Petition,[2] the leased space in question is used by Infusamed, a home health care company providing infusion and pharmacy services that was owned by Healthtrust, Inc. when it was acquired by Columbia. The Order does not require Columbia to divest the Infusamed business. It also appears that the lease was not part of the business of Pioneer Valley Hospital, with which it was identified as a relevant asset. Specifically, Columbia explains that, although the Infusamed program was located temporarily at Pioneer Valley Hospital to enable it to register with the state of Utah and secure necessary licenses, it was subsequently separately incorporated and was not in fact part of the competitive package comprising the Pioneer Valley Hospital Assets.

Columbia claims that the Order should be reopened and modified on the grounds of changed conditions of fact. Specifically, Columbia asserts that there was a mutual mistake of fact during consent negotiations. According to Columbia, during consent negotiations, both Columbia and the Commission were under the impression that the Infusamed Lease Asset was intrinsically related to Pioneer Valley Hospital, one of the Schedule B hospital assets. In reality, Columbia claims, the Infusamed Lease Asset was not "related" to Pioneer Valley Hospital in any sense that is competitively meaningful in terms of that hospital specifically or the relevant acute care inpatient hospital services market in Utah generally. As a result of this mistake, Columbia asserts that there has been a "constructive change of fact" which warrants correction by reopening and modifying the Order to eliminate the requirement that Columbia divest the Infusamed Lease Asset.[3]

Columbia also asserts that reopening and modifying the Order to eliminate its obligation to divest the Infusamed Lease Asset is in the public interest. Columbia states that forcing it to divest the Infusamed Lease will not further the original purposes of the Order. Columbia also states that it will be burdened by unnecessary compliance obligations that will impede its ability to compete in the relevant Utah acute care hospital market. Further, Columbia states that a forced divestiture will cause significant and unforeseen harm to competition for the provision of home health services by interfering with the ongoing business of the Infusamed regional home health care company.

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45 (b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent

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[2] Petition at 3 & Exhibit D.

[3] In support, Columbia cites the Commission's decision in Saint-Gobain/Norton Industrial Ceramics Corporation, Docket No. C-3673, Order Reopening and Modifying Order (November 19, 1996) (mutual mistake caused a "constructive change of fact" justifying a modification).

"makes a satisfactory showing that changed conditions of law or fact" require such modification. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").[4]

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. Hart Letter at 5; 16 C.F.R. § 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), 1979-83 Transfer Binder, FTC Complaints and Orders, (CCH) ¶22,007, p. 22,585 ("Damon Letter"), at 2. For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." Damon Corp., Docket No. C-2916, 101 F.T.C. 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. Damon Letter at 2. The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm. Damon Letter at 4.

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); see also Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify). If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. See Federated Department Stores, Inc. v. Moitie, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

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[4] See also United States v. Louisiana-Pacific Corp., 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification.").

Columbia has not met its burden of showing that changed conditions of fact require reopening and modifying the Order. First, the Commission disagrees with Columbia's assertion that the mistaken inclusion of the Infusamed Lease Asset was a mutual mistake by both parties to the consent negotiations. In deriving the list of related assets and businesses to be divested by Columbia along with the core divestiture assets required to be included as the Part I assets of Schedule B (i.e., which Utah hospitals should be divested), the Commission relied on the representations of Columbia that each one of the three separate lease assets identified by Columbia for inclusion on Part II, Section A, of Schedule B (i.e., Items 3 and 4 as well as Item 6, the Infusamed Lease Asset) was related to the business of Pioneer Valley Hospital. It was only when Columbia negotiated its divestiture agreement with Paracelsus Healthcare Corporation, which acquired, among other things, the Pioneer Valley and Davis hospitals in Utah, that Columbia realized its error and also ascertained that Paracelsus did not want the Infusamed Lease Asset. As the Commission stated in Saint-Gobain: "Oversights made unilaterally by respondents do not constitute changed conditions of fact within the meaning of Section 5(b) of the FTC ACT."[5] The mistake in this case was made unilaterally by Columbia and was not a mutual mistake of fact.

More significantly, however, this case does not present the kind of situation that the Commission recognized as establishing a "constructive" change of fact in Saint-Gobain. Application of the "constructive" changed facts ground for reopening a final order is limited to situations where, as in Saint-Gobain, the order misnames, mislabels or misidentifies a person, place or thing, and this error incorporated in the order prevents the respondent from complying with the order as written, so that the purposes of the order cannot be achieved. In these situations, the error will typically involve a single fact, the truth or accuracy of which is easily and objectively verifiable, e.g., whether an individual is or is not an officer of a particular corporation, or whether an asset is located at "105 Wright Bros. Drive" or "150 Wright Bros. Drive." In these circumstances, reopening and modification is necessary to allow achievement of the order's remedial purposes. Unlike the situation presented in Saint-Gobain, Columbia is not prevented from complying fully with the Order as written, nor would divestiture of the Infusamed Lease Asset frustrate the Order's purposes. Accordingly, Columbia has not demonstrated that reopening of the Order is compelled on grounds of changed condition of fact.

Columbia has, however, met its burden of showing that public interest considerations warrant reopening and modifying the Order to eliminate the requirement to divest the Infusamed Lease Asset. Columbia has met its burden of showing an affirmative need to reopen the proceeding caused by the continued operation of the Order. Columbia has shown that in view of its divestiture of Pioneer Valley Hospital (the hospital with which the Infusamed Lease Asset was identified as a related asset), the Pioneer Valley Hospital acquirer's lack of interest in the Infusamed Lease Asset, and the lease's lack of competitive significance in the relevant acute care hospital market, continuing to require Columbia to divest the lease is burdening it with unnecessary expense in terms of achieving the order's remedial purposes, and is having a negative

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[5] Saint-Gobain/ Norton Industrial Ceramics Corporation, Docket No. C-3673.

impact on its ability to compete. Columbia has also shown that requiring it to divest the Infusamed Lease Asset will cause harm to competition in the market for the provision of home health services. The Commission's complaint did not identify any competitive problems in the market for home health services and, accordingly, the Commission sought no relief in this market. Requiring Columbia to divest the lease in light of a lack of interest by the acquirer of the other divested assets, and the lack of any allegation in the complaint that a competitive problem exists in the home health services market, would impede competition in that market.

Where the potential harm to the respondent outweighs any further need for the Order, the Commission may modify the Order in the public interest to allow the respondent to retain the relevant assets.[6] Because the Infusamed Lease Asset has been shown to have no competitive significance in the acute care hospital market in Utah, there is no need for Columbia to divest the lease. The remedial purposes identified in the Order have already been achieved by the divestitures that have taken place. Further, requiring Columbia to divest the Infusamed Lease Asset will cause harm to competition for the provision of home health services. The harm and costs to Columbia associated with the continuing requirement to divest the lease appear to be significant, while there do not appear to be any benefits associated with requiring the divestiture.

ACCORDINGLY, IT IS ORDERED that this matter be, and it hereby is, reopened; and

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[6] See S.C. Johnson & Sons, Inc., Docket No. C-3418, Order Reopening Proceeding and Modifying Order (November 8,1993)(order modified on public interest grounds to eliminate requirement to divest remaining international Renuzit assets not in the relevant market and not wanted by the acquirer of the divested North American Renuzit assets); T&N plc, Docket No. C-3312, Order Reopening Proceeding and Modifying Order (November 13, 1991)(order modified on public interest grounds to permit respondent to retain inventory not wanted by the acquirer).

IT IS FURTHER ORDERED that the Order in Docket No. C-3619, be, and it hereby is, modified by deleting the asset identified as Schedule B, Section A, Part II, Item 6: "Lease of 7,134 sq.ft., 150 Wright Bros. Drive, Suite 540, Salt Lake City, Utah 84116" from the list of assets to be divested.

By the Commission, Commissioner Azcuenaga and Commissioner Starek concurring in the result only.

Donald S. Clark
Secretary

ISSUED: July 14, 1997

SEAL

Concurring Statement of Commissioner Mary L. Azcuenaga
in Columbia/HCA Healthcare Corp ., Docket No. C-3619

Today, the Commission reopens the order against Columbia/HCA Healthcare Corporation under Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. Sec. 45(b), to eliminate the requirement that Columbia/HCA divest an ordinary commercial lease of a 7143 square foot office suite on the ground that reopening and modifying the order is in the public interest. I agree with the result but not with the reasoning of the majority.

The majority is correct that a showing of affirmative need is required before an order will be reopened under the public interest standard, and only after such a showing of affirmative need does the Commission balance the public interest reasons for and against the modification. See Damon Corp ., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (Mar. 29, 1983). Commission Rule 2.51(b), 16 C.F.R. Sec. 2.51(b), provides that the petition must be supported by affidavits containing "specific facts" justifying the reopening and modification of an order and cautions against "conclusory" justifications. Because Columbia/HCA failed to make the requisite showing of affirmative need under Rule 2.51(b), I cannot agree with the majority that the petition should be granted under the public interest standard.

Finding affirmative need, the majority states: "continuing to require Columbia to divest the lease is burdening it with unnecessary expense in terms of achieving the order's remedial purposes, and is having a negative impact on its ability to compete." Order at 5. The affidavit filed in support of Columbia/HCA's petition contains the bare assertion that the expenditure of time and other resources (presumably to find a buyer for the lease) will impede its ability to compete in the hospital market. [1] It is virtually always foreseeable at the time a consent agreement is signed that a divestiture will entail "time and other resources" to accomplish. An order need not be reopened and modified on the basis of a circumstance that is

[1] The entire explanation provided in the supporting affidavit is as follows: "Columbia/HCA will suffer unforeseen competitive harm if it is forced to divest the Infusamed Lease Asset. Columbia/HCA is extremely unlikely to find a buyer for the lease, which will terminate in five months. Meanwhile, the required expenditure of time and other resources will impede Columbia/HCA's ability to compete effectively, particularly in the Salt Lake Area acute care hospital market. Finally, a forced divestiture will interfere with the ongoing business of the Infusamed regional home health care company."

foreseeable at the time that a consent order is signed. See Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986); United States v. Louisiana-Pacific Corp., 967 F.2d 1372, 1378 (9th Cir. 1992).

Columbia/HCA does not assert, much less support, a particular cost of leaving the requirement to divest the lease in the order. This omission alone is sufficient ground to deny the petition under the public interest standard. On this point, the Commission's decision is tantamount to waiving the requirements of Rule 2.51(b) that a petition must be supported with particularity. It seems to me that the requirements of Rule 2.51(b) are there for good reason, and I see no reason to waive them.

The majority's substantive discussion of affirmative need is contained in one paragraph. Order at 4-5. After stating its conclusion that the petitioner has shown affirmative need, the majority refers in one sentence to three circumstances to bolster its conclusion: the already completed divestiture of Pioneer Valley Hospital, the hospital acquirer's asserted lack of interest in the lease, and the "lack of competitive significance [of the lease] in the relevant acute care hospital market." Order at 4-5. None is explained. Pioneer Valley Hospital was divested, as required by the Commission's order, to Paracelsus Healthcare Corp., except for the lease in question, which was listed among the "Pioneer Valley Assets" to be divested. It is at best unclear why a partial divestiture justifies elimination of the remaining divestiture obligation. Surely this is not a precedent the majority would like to establish for other cases.

Second, the majority relies on "the Pioneer Valley Hospital acquirer's lack of interest" in the lease. Assuming the truth of this conclusion, it is not at all clear why it should be relevant. Columbia/HCA asserts in a single sentence that

Paracelsus did not want the lease in question. Petition Para. 8. In the past, the Commission has been rigorous in probing assertions like this. Its failure to do so here is an indication that the Commission thinks the lease is competitively insignificant, which, indeed, is the next circumstance to which the majority refers as a basis for granting the petition. The majority's reliance on the "lack of competitive significance [of the lease] in the relevant acute care hospital market" amounts to a finding that the Commission made a mistake in requiring divestiture of the lease. But for the assumption that the lease was competitively significant, there would have been no possible reason to require divestiture in the first place.

Finally, the majority states that divestiture of the lease "will cause harm to competition in the market for the provision of home health services." Order at 5. This asserted harm is entirely unexplained, [2] no doubt because the market for home health services was not alleged in the complaint and is not otherwise at issue in the order that Columbia/HCA seeks to have changed. Presumably, the majority would not so lightly assume harm to competition in a market it has not studied or previously identified -if the majority were deciding liability. To do so in this context undermines the Commission's analytical standards.

The petitioner asserts that the petition should be granted on the basis of mutual mistake of fact (constructive change of fact), citing Saint-Gobain/Norton Industrial Ceramics Corp., Order Reopening and Modifying Order, Docket No. C-3573 (November 19, 1996). On that ground, I concur in the result.

[2] The closest the majority comes to an explanation is: "Requiring Columbia to divest the lease in light of a lack of interest by the acquirer of the other divested assets, and the lack of any allegation in the complaint that a competitive problem exists in the home health services market, would impede competition in that market." Order at 5. The complaint also lacks any allegation that a competitive problem exists in the market for commercial real estate in Salt Lake City, just to take one of any number of examples, but that hardly justifies changing an order that addresses the market for acute care hospital services.

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III, CONCURRING IN THE RESULT

In the Matter of

Columbia/HCA Healthcare Corporation

Docket No. C-3619

The order in this case requires respondent to divest assets in several areas of the country, as a remedy for the likely anticompetitive effects of respondent's acquisition of Healthtrust, Inc. - The Hospital Company. One of the assets required to be divested is the "Infusamed Lease," an office space in Salt Lake City from which respondent's Infusamed subsidiary provides infusion and pharmacy services.

Respondent has petitioned to reopen and modify the order to eliminate the Infusamed Lease from the schedule of assets to be divested. Respondent claims that both parties to the consent settlement of this matter (*i.e.*, both respondent and the Commission) labored under the erroneous assumption that the Infusamed Lease was a vital part of Pioneer Valley Hospital -- one of the primary assets that respondent was required to divest -- when in fact the Infusamed Lease has no critical relationship to the Hospital. Arguing that this mutual error regarding the Infusamed Lease constitutes a "constructive change of fact," respondent bases its request on our ruling last fall in *Saint-Gobain/Norton Industrial Ceramics Corp.*[1] -- the case in which we articulated the concept of a "constructive change of fact." Alternatively, respondent contends that the public interest requires the deletion of the Infusamed Lease from the divestiture assets.

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[1] Docket No. C-3673 (Order Reopening and Modifying Order, Nov. 19, 1996).

I reach the same conclusion as my colleagues: respondent has made the case for modifying the order. The Infusamed Lease is not critically related to Pioneer Valley Hospital and should not have been included in the assets to be divested. I am comfortable reaching this result either on a "constructive change of fact" basis or on the ground that it is in the public interest to grant the requested modification.

In the present order, however, the majority concludes that respondent has not shown a "constructive change of fact" within the parameters outlined in *Saint-Gobain*. First, my colleagues "disagree[] with Columbia's assertion that the mistaken inclusion of the Infusamed Lease Asset was a mutual mistake by both parties to the consent negotiations." [2] The majority tries to bolster this conclusion by observing that "the Commission relied on the representations of Columbia that each one of the three separate lease assets identified by Columbia for inclusion [in the relevant schedule to the consent order] was related to the business of Pioneer Valley Hospital. . . . The mistake in this case was made unilaterally by Columbia and was not a mutual mistake of fact." [3]

But as I understand the facts, both respondent *and the Commission* were under the misimpression that the Infusamed Lease was sufficiently related to Pioneer Valley to require inclusion in the set of divestiture assets. That the Commission may have "relied" on respondent's representations to this effect changes nothing: with or without such reliance, the fact remains that both parties to the consent agreement -- Columbia/HCA and the

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[2] Order Reopening and Modifying Order at 4 (July 14, 1997).

[3] *Id.*

Commission -- entertained an incorrect view of the Infusamed Lease. This mistake was no less "mutual" than was the error (concerning the status of certain Carborundum managers) at the heart of the "constructive change of fact" doctrine that we announced in *Saint-Gobain*.[4]

The majority's second reason for rejecting respondent's "constructive change of fact" claim is even more perplexing. The majority states: "[T]his case does not present the kind of situation that the Commission recognized as establishing a 'constructive' change of fact in *Saint-Gobain*. Application of the 'constructive' changed facts ground for reopening a final order is limited to situations where, as in *Saint-Gobain*, the order misnames, mislabels or misidentifies a person, place or thing, and this error incorporated in the order prevents the respondent from complying with the order as written, so that the

[4] Nor, I suspect, did the Commission "rely" any less on respondent's representations in *Saint-Gobain* than in the present case. Indeed, if the Commission had done an independent fact-finding concerning the Carborundum personnel -- rather than relying on respondent's representations -- it is highly likely that there never would have been an error concerning the Carborundum managers.

purposes of the order cannot be achieved. In these situations, the error will typically involve a single fact, the truth or accuracy of which is easily and objectively verifiable . . ." [5]

I search in vain for language in our *Saint-Gobain* order to support the gloss my colleagues have put on it here. Nothing in that order speaks to the singularity of the fact at issue or to its easy or objective verifiability. With regard to prevention of compliance with the order and frustration of its purposes, the only sentence pertinent to this issue in our *Saint-Gobain* order [6] is hardly authority for the almost categorical limitation that my colleagues announce today. All of the majority's *post hoc* qualifications on the meaning of *Saint-Gobain* seem designed to mitigate the impact of a decision with which they may have become uncomfortable. If that is the majority's purpose, however, it finds no source in the text of *Saint-Gobain* itself.

In any event, even if my colleagues are correct that the kind of mistake cognizable under the "constructive change of fact" doctrine "will typically involve a single fact, the truth or accuracy of which is easily and objectively verifiable," why is the Infusamed Lease situation not a suitable candidate? Although my colleagues are silent on this question, the critical facts surrounding the Infusamed Lease do not differ materially (in terms of objective verifiability, etc.) from the facts concerning the Carborundum managers in *Saint-Gobain*, and I find the present case a worthy candidate for application of the constructive change of fact doctrine.

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[5] Order Reopening and Modifying Order, *supra* n.2, at 4.

[6] "Saint-Gobain cannot, therefore, comply with the terms of Paragraph 5.d. of the Hold Separate." *In the Matter of Saint-Gobain/Norton Industrial Ceramics Corp.*, Order Reopening and Modifying Order, *supra* n.1, at 4.

Having rejected changed conditions of fact as a basis for modifying the order, the majority turns to respondent's assertion that public interest considerations also warrant the requested relief. Although I agree that it is in the public interest to excuse respondent from an obligation to divest the Infusamed Lease, I cannot agree that respondent has satisfied the "affirmative need" standard, which has become enshrined in the Commission's public interest order modifications despite having no rightful place in our jurisprudence. [7]

Indeed, were my colleagues to apply their affirmative need criterion with any sort of rigor, respondent's public interest argument would fail. For example, I would be interested to learn what evidence supports the majority's observation that "continuing to require Columbia to divest the [Infusamed] lease is burdening it with unnecessary expense in terms of achieving the order's remedial purposes, and is having a negative impact on its ability to compete." [8] Moreover, how has Columbia shown that "requiring it to divest the Infusamed Lease Asset will cause harm to competition in the market for the provision of home health services"? [9] And what is in the record to support the majority's conclusion that "[r]equiring Columbia to divest the lease in light of a lack of interest by the acquirer of the other divested assets, and the lack of any allegation in the complaint that a competitive problem exists in the home health services market,

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[7] For one directly pertinent illustration of my oft-stated views on affirmative need, *see In the Matter of Columbia/HCA Healthcare Corp.*, Docket No. C-3619, Order Reopening and Modifying Order (May 15, 1996) (Statement of Commissioner Roscoe B. Starek, III, Concurring in the Result).

[8] Order Reopening and Modifying Order, *supra* n.2, at 5.

[9] *Id.*

would impede competition in that market"? [10] Absent more information and analysis regarding home health services in the Salt Lake City area, how could the Commission possibly know that requiring respondent to divest the Infusamed Lease would "impede competition" in that "market"? Respondent's petition furnishes little in the way of substantiation, nor does the order issued today go beyond the conclusory.

Nevertheless, it is clearly in the public interest to grant the requested relief. The Infusamed Lease was included among the divestiture assets through an error, and -- entirely apart from the role that this error plays under the constructive change of fact doctrine -- the public interest requires that it be rectified. This conclusion is derived from a simple, straightforward balancing of the reasons to delete this

[10] *Id.*

divestiture requirement against the reasons to retain it. Consideration of the "affirmative need" question simply muddles the analysis. [11]

[11] As I have noted elsewhere, "[a] case such as this one -- in which the affirmative need 'evidence' is paltry, but the requested relief fairly cries out to be granted -- demonstrates why the Commission should summon the will to jettison the 'affirmative need' concept and embrace explicitly a simple cost/benefit balancing approach to order modifications pursuant to the 'public interest' standard of [Commission] Rule 2.51." Statement of Commissioner Roscoe B. Starek, III, Concurring in the Result, *supra* n.7, at 2.